Date: February 20, 1998

Case No.: 98-TLC-6

In the Matter of:

W.A. MALTSBERGER, d.b.a. MALTSBERGER RANCH,
Employer.

Appearances: W.A. Maltsberger
pro se

Harry Sheinfeld, Esq.,
for the U.S. Department of Labor

Allen R. Moody
for the Texas Ranchers Labor Association, Inc.
Amicus Curiae

BEFORE: THOMAS M. BURKE
Associate Chief Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and its implementing regulations, found at 20 C.F.R. Part 655.[1] This Decision and Order is based on the written record, consisting of the Employment and Training Administration appeal file ("AF"), and the written submissions from the parties. §655.112(a)(2). Maltsberger Ranch has requested expedited review of a decision by a U.S. Department of Labor Certifying Officer ("CO") denying an application for temporary alien agricultural labor certification for fourteen un-named aliens to work as "Ranch Worker, Cattle" from April 16, 1998 until April 2, 1999. The denial is based on the CO's conclusion that because Employer's application is for eleven and one-half months, the employment offered is permanent.

BACKGROUND

Employer herein has had three previous appeals before this Office. All three appeals resulted in the reversal of the Regional Administrator's determination. ***W.A. Maltsberger, d.b.a. Maltsberger Ranch***, 93-TLC-6 (July 2, 1993) (hereinafter "***Maltsberger I***"); ***W.A. Maltsberger,***

[1] Unless otherwise noted, all regulations cited in this decision are in Title 20.

d.b.a. Maltsberger Ranch, 94-TLC-3 (June 6, 1994) (hereinafter "***Maltsberger II***"); ***W.A. Maltsberger, d.b.a. Maltsberger Ranch***, 94-TLC-6 (June 6, 1994) (hereinafter "***Maltsberger III***"). The issue on appeal in each those cases is similar to the one *sub judice*; that is, whether the job opportunity is for agricultural labor or services of a temporary or seasonal nature. In ***Maltsberger I***, Judge Clarke found that

> [t]he record indicates that Maltsberger has a frequent, unpredictable need for temporary cattle ranch workers[.] . . . Moreover, the record indicates that it is impractical for Maltsberger to apply for workers on a job-by-job basis, because his need for temporary workers varies from time to time and may be in response to emergency situations requiring immediate action . . . [and] because the aliens are only willing to work in this country for five to eight weeks before returning to Mexico to be with their families, Maltsberger's efforts to maintain the aliens' work status as temporary while at the same time ensuring a supply of temporary alien labor as needed to satisfy his business demands appears reasonable.

(AF 60; ***Maltsberger I***, *slip op.* at 7). In ***Maltsberger II***, Judge Clarke found that in ***Maltsberger I*** the "'Maltsberger cattle ranch job opportunities are for agricultural services or labor of a temporary or seasonal nature, within the meaning of the statute.' . . . The evidence and argument presented herein do not change that determination." ***Maltsberger II***, *slip op.* at 6. The CO requested reconsideration of Judge Clarke's decision in ***Maltsberger II***. On reconsideration, Judge Clarke affirmed his prior decision stating

> To date there have been no U.S. workers available and willing to fill [Maltsberger's] need. His decision to seek temporary rather than permanent certification for alien laborers appears to be a responsible choice, since aliens who are granted permanent status are likely to leave the Maltsberger Ranch for more lucrative work elsewhere in the U.S., displacing U..S. workers in other jobs.

Maltsberger II - Reconsideration, *slip op*. at 1. Similarly, in ***Maltsberger III***, Judge Clarke found that the work at Maltsberger's ranch is agricultural and that Maltsberger had a need that could not be filled by the U.S. work force, for temporary workers to perform temporary or seasonal work. (AF 42-51).

STATEMENT OF THE CASE

Maltsberger Ranch filed an application on January 30, 1998, for temporary alien agricultural labor certification (AF 21-41). The CO notified Employer by letter dated February 6, 1998, that the application was unacceptable because the application appears to be for permanent rather than temporary employment (AF 17). Employer was instructed to "submit sufficient documentation to establish that the instant job offer is of a temporary or seasonal

nature and is not based on the needs of the worker's needs (sic) for leaves of absence. Further, the employer must establish that the work represent employment which is based on the nature of the employer's need for the livestock workers. The employer must also prove that the need for the performance of the job duties will not continue on a year-round basis." *Id*.

Included in the Appeal File forwarded by the CO is a copy of a recent decision issued by Chief Judge John M. Vittone in the matters of ***Kentucky Tennessee Growers Association***, 98-TLC-1 (Dec. 16, 1997) and ***Green Valley Farms, Inc.***, 98-TLC-2 (Dec. 16, 1997) (hereinafter referred to as "KTGA") (AF 5-11), copies of two previous decisions involving this same Employer and similar applications (AF 42-51 and 54-60).

Employer's Submissions

Employer contends that he has established that his application is for actual temporary or seasonal employment as evidenced by prior applications and that his use of alien workers is not displacing U.S. workers as seen in the complete lack of U.S. applicants in response to each advertisement of the job offer, in five states, since 1991 (Employer's Brief at 5, fn 6). Employer asserts in his application that out of a 350-day contract period, the average worker requests four to six periods of leave which total between 88 and 122 days of leave without pay per worker (AF 26). Employer was unable to identify specific peak workloads in that "[p]eak workloads vary with calving dates, animal health problems, weather, nutritional needs, market conditions and unforeseen acts of God." *Id*.

Employer supplemented the record with a brief; copies of prior correspondences with this Office; Employment Security Agency Issuance No. 92-88 (ESAI No. 92-88); U.S. Department of Labor Field Memorandum No. 74-89 (U.S.D.O.L. No. 74-89); Certifying Officer's Brief in *Vito Volpe Landscaping*, 91-INA-300, *et seq.*; U.S. Department of Justice, Office of Legal Counsel Memorandum for Alan C. Nelson, Commissioner, INS; and a letter to Judge Vittone dated February 10, 1998.

ESAI No. 92-88 is a memorandum dated June 16, 1988, signed by Floyd E. Edwards, Regional Administrator, U.S. Department of Labor, Employment and Training Administration, Dallas, Texas, addressed to Region VI Employment Security Agencies. The memorandum informs the region of language found to be acceptable by the former Secretary of Labor, Ann McLaughlin, regarding statements of wages to be paid by range livestock employers. The wages are based on the approved job duties that may include "feeding, grazing, care, and protection of livestock, as needed, 24 hours per day, 7 days per week, Sundays and holidays included." (emphasis added).

U.S.D.O.L. No. 74-89 is a memorandum dated May 31, 1989, signed by Donald J. Kulick, Administrator, Office of Regional Management, addressed to all Regional Administrators. The memorandum addresses the special procedures for labor certification for sheepherders under the H-2A program. The memorandum sets forth the historical background and special handling of labor certification for alien sheepherders. Basically, the memorandum

explains that the unique occupational characteristics of sheepherding; i.e., "spending extended periods of time grazing herds of sheep in isolated mountainous terrain; being on call . . . 24 hours a day, 7 days a week" are significant factors in limiting the number of interested U.S. workers. It goes on to state that the Immigration Reform and Control Act of 1986 (IRCA) did not address the sheepherder program; however, the memorandum notes that DOL's interim final regulations of June 1, 1987, 20 C.F.R. §655.93(c), permit the continuance of special handling of sheepherder applications and the adaption of such procedures to occupations in the range production of other livestock. (emphasis added). A note is made that these interim final regulations represent DOL's contemporaneous interpretation of IRCA. The second part to this memorandum sets forth the special procedures for processing labor certification applications for sheepherders. Most relevant to the issue in this matter, is the section regarding the period of employment, which states that:

> The total period of employment (Item No. 5 on Form ETA-790) must be for less than one year. The Regional Office cannot grant an H-2A labor certification for a period of time longer than one year minus one day.

Employer also submitted a copy of the Certifying Officer's brief submitted in ***Vito Volpe Landscaping***, 91-INA-300, *et al*. (Sep. 29, 1994) (*en banc*). The employers in ***Vito Volpe*** applied for permanent alien labor certification for landscape gardeners under the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), as amended, and its implementing regulations at 20 C.F.R. Part 656. A four member majority of the Board found that the positions -- that were for a ten month period -- fit the definition of "seasonal employment" as found under the temporary labor certification regulations in that the duties are "exclusively performed at certain seasons or periods of the year." Accordingly, despite the fact that the position was full-time and recurring, the job was not permanent. To support its position that the positions were not permanent, rather they were temporary and seasonal, the CO in his brief in ***Vito Volpe*** relied on the fact that the applications were for approximately ten months of the year, that employers conceded that work as a landscape gardener cannot be performed in January and February of the year, and that the job duties are only performed during certain months of the year. The brief goes on to state that:

> It is clear . . . that the job duties are performed during certain identifiable months of the year and that those duties cannot be performed in the remaining months. These job opportunities are clearly seasonal as defined by the regulations. This conclusion is fully consistent with the Justice Department's official view on what constitutes temporary employment under the Immigration and Nationality Act. The Office of Legal Counsel, responding to a request by the Department of Labor regarding what constitutes temporary work for purposes of the temporary alien agricultural labor certification program, stated:

> In deciding how long such a job may be held on a "temporary" basis, we referred to two sources. First, the dictionary definition of the word "temporary" refers to a limited period of time. Second, we examined the existing INS and [DOL] regulations governing H2 (sic) workers. The [DOL]'s regulations for H-2 workers state that temporary labor certifications "shall never be for more than eleven months." 20 C.F.R. § 655.206(b)(1). Similarly, the INS' H2 (sic) regulations provide that the petition will be approved for the length of the certificate issued by the [DOL] (eleven months) or, if no date is given on the certificate, "approval of the petition will not exceed 1 year." 8 C.F.R. § 214.2(h)(6)(i). **Thus, . . . the basic rule for H-2 petitions is that a "temporary" job means for one year or less.**

(**emphasis added**).

The last document submitted by Employer that needs mention is a memorandum from the Office of the Assistant Attorney General, dated April 23, 1987, addressed to the Commissioner of INS, regarding the temporary worker provisions. The position set forth in this memorandum is that the key to determining whether an employment offer is temporary, is to perform an objective analysis of employer's need for the worker. It is irrelevant what the nature of the job is, so long as the employer only needs the employee to perform work on a temporary basis. This definition extends to all agricultural jobs, not just those that were temporary. The Assistant Attorney General examined the regulations and the dictionary for definitions of "temporary," and concluded that in the context of H-2A workers and H-2 workers in general, it means "12 months or less."

The Certifying Officer's Brief

The Office of the Solicitor as counsel for the CO filed a brief in support of the CO's determination. Counsel argues that "[t]here is nothing in the record to suggest that this is anything other than full-time permanent employment. Confronted with these facts and . . . the recent decision in ***Kentucky Tennessee Growers Association, Inc.***, 98-TLC-1, ("***KTGA***") the Certifying Officer acted correctly in denying employer's application." (Solicitor's brief at 2). Counsel suggests that the decision in ***KTGA*** is more appropriate to this application than any of the previous ***Maltsberger*** decisions. *Id*. at 3. Counsel argues that ***Maltsberger II*** hinged on Administrative Law Judge Clarke's finding that "extraordinary circumstances" existed, as defined in §655.101(g), allowing for certification of an application which covered a period that exceeds one year. Counsel argues that this finding was incorrect as applied therein and would be incorrect herein. *Id*. at 4. Counsel states "there is nothing in the record in this case that discusses [the intermittent need for workers] much less explains how it would justify the granting of a

temporary certification. While the employer discusses . . . the amount of leave time his employees normally take, that leave is presumably based on their personal needs, it makes no reference to how any of this relates to its employment needs." *Id*. (emphasis omitted). Counsel surmises that Employer makes his applications for these extended periods "to avoid the administrative inconvenience of filing separate applications to cover situations when he truly has a temporary need to supplement his permanent work force." *Id*. Granting this application would undermine the Department's ability to fulfill its statutory duty to determine the availability of U.S. workers as a predicate to the granting of labor certification.

Amicus Brief

The Texas Ranchers Labor Association ("TRLA") filed an *amicus* brief. *Amicus* argue that the CO incorrectly interpreted ***KTGA***. *Amicus* argues that ***KTGA*** does not hold, as the CO asserted in her determination, "that the intended period of employment should not exceed nine months unless employer can substantiate the employment is not intended to continue indefinitely, or is not essentially on a year-round basis." (*Amicus* brief at 2 (*quoting* Determination at AF 17)). *Amicus* asserts that ***KTGA*** stands for the proposition that where applications are for a period of nine months, an RA may -- not shall -- require further substantiation. However, where an application demonstrates an employer's need for temporary or seasonal workers, such an inquiry would be inappropriate. Further, *amicus* argues that the decision in ***KTGA*** hinged on the facts of that case; that is, a complete lack of a record to determine employers's needs. *Id*. at 4. *Amicus* points out that the record herein is abundant with evidence that Employer has a need for temporary and seasonal workers.

Amicus quotes the regulations and the regulatory history to stress that the inquiry is two-fold; i.e., temporary being one and seasonal being the second.

> Labor is performed on a seasonal basis, where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.

(*Amicus* brief at 5 emphasis as it appears in *amicus's* brief (*quoting* §655.100 (c)(2)(ii) (*citing* 29 C.F.R. §500.20)).

Amicus notes the statement of the regulatory history that the meaning ascribed to the word "temporary" "will not be a problem for much of agriculture, which uses workers on a seasonal basis." (*Amicus* brief at 5); 52 Fed. Reg. 20, 497 (1987) (interim final rule June 1, 1987). The regulatory history also indicates that: "Of course, with respect to truly 'seasonal' employment, it is appropriate and should raise no issue for an employer to apply to DOL each

year for temporary alien agricultural labor certification for job opportunities recurring annually in the same occupation." *Id*. at 20,498.

DISCUSSION

The issue herein is whether Employer set forth on his application that the job opportunity is for agricultural labor or services of a *temporary or seasonal nature*. Pursuant to §655.101(g), "[t]he employer shall set forth on the application sufficient information concerning the job opportunity to demonstrate to the RA[2] that the need for the worker is "of a *temporary or seasonal nature*", as defined at §655.100(c)(2) of this part. Job opportunities of 12 months or more are presumed to be permanent in nature." §655.101(g) (*emphasis added*).

The purpose of the regulations is to protect the U.S. work force. §655.90(d). Employer herein filed his first application for temporary agricultural labor certification for ranch worker, cattle, in 1991 (AF 47). Each prior application was accompanied by a test of the market for U.S. workers, and each time, neither the DOL nor the Texas Employment Commission was able to find a single U.S. worker who was willing and able to accept the position. (Employer's Brief at 5, fn 6). Thus, there is no evidence that Employer's use of H-2A non-immigrant alien workers displaces U.S. workers.

In this matter, the CO found that the job opportunity of Ranch Worker, Cattle was not "of a temporary or seasonal nature" because the job opportunity was for an eleven and one-half month period. In making this determination, the CO relied in part on ***Kentucky-Tennessee Growers Association***, 98-TLC-1 (Dec. 16, 1997). The CO stated that the ALJ held in ***KTGA*** "that the intended period of employment should not exceed nine months unless the employer can substantiate the employment is not intended to continue indefinitely, or is not essentially on a year-round basis." (AF 17). This is a misapplication of ***KTGA***. The opinion in ***KTGA*** states that the use of nine-months as a red flag or a benchmark for further inquiry is not contrary to the regulatory definition of "temporary" which states that the job opportunity shall be "for a limited period of time, which shall be for less than one year". *Id*. at *slip op*. 5; 655.100(c)(2)(iii). The RA's determinations in ***KTGA*** were affirmed, not because the job opportunities were for periods of employment that exceeded nine-months, but because of a complete lack of documentation.[3]

There is nothing in this application to indicate that Employer's need for Ranch Workers, Cattle is anything but temporary or seasonal. The application itself demonstrates this need. Maltsberger's cattle ranch workers work on an intermittent basis, often taking weeks off from

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[2] Under the regulations, the determination of whether to accept an application for consideration and whether to certify the application is made by the Regional Administrator ("RA"); however, the regulations permit the RA to delegate that responsibility to a staff member. §655.92. Thus, in this matter, the Certifying Officer made the determination.

[3] Employers in ***KTGA*** relied solely on the fact that their applications stated a time period of "less than one year," and the argument that such jobs are typically certified as seasonal and temporary. There was no documentation to support employers contention that their **need** was temporary or seasonal.

work because they have no desire to reside permanently in the U.S.[4] Such absences are not consistent with typical permanent full-time employment. The work that these ranchers perform vary depending on the season and the natural, unpredictable occurrences throughout the seasons.[5] This does not violate the regulations which allow a worker, while employed in agriculture, to move from one seasonal activity to another, and still be considered to be employed on a seasonal basis even though he may continue to be employed during a major portion of the year. *See* §655.100 (c)(2)(ii).

The CO in her determination improperly required Employer "to establish that the instant job offer is of a temporary or seasonal nature". (AF 17). An employer seeking the benefits of H-2 visas for non-immigrant aliens must establish that it has a temporary need for these workers, not that the job is temporary. This interpretation is supported by the regulatory and rulemaking history. *See* 52 Fed. Reg. 16,770 (1987) (proposed May 5, 1987); 52 Fed. Reg. 20,496 (1987) (interim final rule June 1, 1987); 52 Fed. Reg. 20, 507 (1987) (codified at 20 C.F.R. pt. 655). The rulemaking indicates that the Department of Labor accepted the administrative and judicial interpretation as set forth in the leading case ***Matter of Artee Corporation***, 18 I. & N. Dec. 366 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982).[6] ***Artee*** held that what is relevant in determining whether an employer has made a *bona fide* H-2 application is "whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling." *Id.*; 52 Fed. Reg. 20,497 - 20, 298 (1987) (interim final rule June 1, 1987).

It is unlikely, as argued by the CO, that Employer could get permanent labor certification for these positions. These jobs do not continue on a full-time basis throughout the year. *See* ***Vito Volpe***, *supra*. Further, there is substantial evidence that even if Employer could get permanent labor certification, once the alien worker obtained the certification, the worker would leave ranch work and seek employment in a more lucrative industry, competing for a job where there are sufficient U.S. workers to occupy the position. This is consistent with the fact that

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[4] This is the very definition of an "H-2A" worker; that is, an individual "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . of a *temporary or seasonal nature*". 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (*emphasis added*).

[5] "We've always picked up seasonal help to fill out our crew when conducting our spring and fall workings of cattle to brand, castrate, medicate, wean, worm, and ship to market. . . . One of our greatest needs for temporary help has always been the feeding of our cattle in times of emergency. Range fire, insects, drought, hail, freezing weather, or unusually wet winters can all cause need for unforeseen and temporary emergency feeding of our livestock. . . . Ranching throughout [this region] is a different industry than the stock farms of more stable climates." (Letter from Maltsberger to ETA dated September 19, 1991, and re-executed on February 11, 1998).

[6] Prior to the INS decision in ***Artee***, the INS determined temporariness by looking to the nature of the duties performed, not to the intent of the petitioner employer and the alien beneficiary concerning the time that the alien beneficiary would be employed in that position. ***Matter of Contopoulos***, 10 I. & N. Dec. 654 (1964).

Maltsberger's workers take frequent and extended absences.[7] The alien workers do not work anywhere near a permanent work schedule. Maltsberger has agricultural work that he needs filled during the various seasons on a temporary or seasonal basis, and requires visas for an extended period because he not only cannot predict mother nature, but cannot predict the attendance of his workforce.

The CO's concern that the a U.S. worker looking at this job opportunity would think it is permanent, and thus would not apply, is more appropriately addressed in the recruitment phase and the wording of the advertisement.

The three prior decisions of Judge Clarke regarding this Employer found that these jobs were temporary or seasonal as defined by the regulations, and the evidence and arguments presented herein do not change that. The only difference between those applications and the one *sub judice* is the decision in ***KTGA***, and as discussed *supra*, the CO misinterpreted and misapplied that decision. Because the CO set forth an erroneous standard in her determination, and misapplied the position set forth in ***KTGA***, and because Employer has established a need for temporary or seasonal workers, the CO's determination was not proper. I do not find a problem with the fact that Maltsberger applies year after year for H-2A visas because this is truly 'seasonal' employment, and as stated in the regulatory history, with respect to truly 'seasonal' employment, it is appropriate and should raise no issue for an employer to apply to DOL each year for temporary alien agricultural labor certification for job opportunities recurring annually in the same occupation." 52 Fed. Reg. 20,498 (1987) (interim final rule June 1, 1987). Accordingly, the following Order shall issue.

[7] Applications for occupations in the range production of livestock may receive special handling because of the very nature of the occupational duties. §655.93(c). These duties make these positions unattractive to U.S. workers. The regulations may anticipate that there will be no U.S. workers for these positions, however, the regulations still require that the applications be for less than one year. Thus, employers must re-apply each year, and re-test the market each year. As evidenced by this application and the past applications of Employer herein, he is not avoiding the administrative process nor is he avoiding testing the market for U.S. workers.

ORDER

The determination of the Certifying Officer in the above matter is hereby **REVERSED** and the Certifying Officer **ORDERED** to process the application in accordance with the regulations.

SO ORDERED.

THOMAS M. BURKE
Associate Chief Administrative Law Judge